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**JAN 27 2009**

**OFFICE OF PETITIONS**

In re Application of :  
Norbert Diekhans : DECISION ON PETITION  
Application No. 09/640,126 :  
Filed: August 16, 2000 :  
Atty Docket No. 3869/59156-083:

This is in response to the RENEWED PETITION UNDER 37 C.F.R. § 1.137(b) filed September 29, 2008. This petition is properly treated as a renewed petition to revive the application based on unavoidable delay.

The petition is **GRANTED**.

The above-identified application became abandoned effective October 17, 2001 for failure to file a reply to the final Office action mailed July 16, 2001. A Notice of Abandonment was mailed on February 26, 2002.

By decision mailed August 23, 2002, a prior petition to withdraw the holding of abandonment filed April 23, 2002 was granted. However, the application again became abandoned as the amendment submitted on petition was determined not to place the application in condition for allowance (See Advisory Action mailed March 28, 2008). Applicant had submitted a response despite having not received the Office action as mailed on July 16, 2001. A courtesy Notice of Abandonment was mailed on April 11, 2008.

By decision mailed April 28, 2008, the PETITION FOR REVIVAL OF AN APPLICATION FOR PATENT ABANDONED UNINTENTIONALLY UNDER 37 CFR

1.137(b) filed March 25, 2008 was dismissed. Applicant's proposed reply was not sufficient to satisfy 37 CFR 1.137(b)(1).

In this regard, it is noted that it would have been appropriate for the prior petition to be considered under 37 CFR 1.137(a), rather than 37 CFR 1.137(b). Attorney for applicant used the form entitled "PETITION FOR REVIVAL OF AN APPLICATION FOR PATENT ABANDONED UNINTENTIONALLY UNDER 37 CFR 1.137(b)." Moreover, applicant submitted an additional PETITION FOR REVIVAL OF AN UNAVOIDABLY ABANDONED PATENT APPLICATION UNDER 37 C.F.R. §1.137(b). However, what is controlling is that attorney for applicant submitted the \$510 fee for consideration of a petition under 37 CFR 1.137(a). It is concluded that despite attorney for applicant's repeated references to 37 CFR 1.137(b), the statutory prerequisite to consideration under 37 CFR 1.137(b), payment of the petition fee, was not met. Further, the arguments on petition support a conclusion that it was intended to be filed under 37 CFR 1.137(a).

Regardless, the prior petition should have been dismissed as the proposed reply was not sufficient to satisfy 37 CFR 1.137(a)(1). However, consideration should have been taken as to whether applicant had met his burden of showing that the entire delay was unavoidable.

On instant renewed petition, applicants submit a request for continued examination (RCE), RCE fee and noted that the submission under 1.114 was the previously filed amendment. The petition was made timely by an accompanying petition and fee for extension of time for response within the third month. The proposed reply submitted on renewed petition is sufficient to satisfy 37 CFR 1.137(a)(1).

Further, the circumstances of the abandonment of this application have been considered and it is determined that applicant has shown that the entire delay was unavoidable within the meaning of 37 CFR 1.137(a). It is noted that in the future in the first instance, it may be more appropriate to file a petition to withdraw the holding of abandonment based on non-receipt of the Office action and to therewith request that the Office action be re-mailed and the period for response restarted, rather than submit a proposed response after final Office action on petition under 37 CFR 1.137(a) as applicant did on April 23, 2002.

Thus, it is concluded that applicants have now met all requirements for revival of this application pursuant to 37 CFR 1.137(a).

Technology Center AU 3671 has been advised of this decision. The application is thereby forwarded to the Technology Center for consideration of the RCE and amendment submitted on petition filed September 29, 2008.

Telephone inquiries regarding this decision may be directed to the undersigned at 571-272-3219.

A handwritten signature in black ink, appearing to read "Nancy Johnson", with a large, stylized loop at the end.

Nancy Johnson  
Senior Petitions Attorney  
Office of Petitions